

No. 15615 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

DEL L. BRANDOW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

FEB 13 1959

PAUL P. O'BRIEN, CLERK



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APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of Count Two of an Indictment. The offense consisted of an alleged false statement pursuant to the Section 1001 of Title 18, United States Code.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statutes Involved.

Count II of the Indictment, the subject of this appeal, was brought under the following statute (18 U. S. C., Sec. 1001):

“Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.”

Preliminary Statement.

It is deemed advisable to call attention to the page numbering or pagination of the “Transcript of Record.” It is to be noted that each page bears two numbers on the upper right hand corner. As we understand the situation, the extreme upper right hand number is controlling and will be referred to when directing attention to such transcript. The lower number was the one placed thereon by the Court Reporter as he numbered the pages he produced for this record. However, in the Indices, as for example the one noted in Volume 1, page 3 of the “Reporter’s Transcript,” refers to the lower of the two page numbers.

Statement of the Case.

Appellant Brandow’s Statement of the Case is so brief that it is deemed advisable to set forth a more extended résumé of the facts of this case.

This prosecution grew out of an investigation being conducted by the Internal Revenue Service of the activities

of a former agent of that service, a Mr. Charles D. Ford, the appellant Brandow and a Los Angeles Attorney William C. Rau, with respect to their endeavor to be engaged by a Delta Boren of San Diego to represent Delta Boren and her husband Clifford Boren and their construction corporation in a matter pertaining to alleged fraud on the part of the Borens as to their income tax for the years 1950 and 1951.

Appellant Brandow was charged as a defendant in three counts of a seven count indictment. Brandow was found not guilty as to Count I, a conspiracy charge; guilty as to Count II, the false statement count and the subject of this appeal; and not guilty as to Count V, another conspiracy charge pertaining to a taxpayer Howard W. Kirch and wife.

The record reveals that for some period of time prior to the fall of 1954, that Mr. Brandow was engaged in the business of an auditor, devoting much of his time to income tax matters, that he was a "tax analyst," that "I assist taxpayers in determining their tax liability." He was known as a tax specialist and started such business in 1932 and had been very active in such business since—"in the early forties" [R. 259].

A codefendant to certain counts of the instant indictment was one Charles D. Ford. Ford was found not guilty in all counts wherein he had been charged as a defendant, *i.e.*, Counts I, IV and V. Ford had been with the Internal Revenue Service since August 8, 1945, except for an interval of about one year, and had left such Service about September 10, 1954 [R. 327-338]. Among Ford's duties with the Internal Revenue Service while he, Ford, was assigned to the San Diego office was a case concerning the Boren tax matters, which case he had

taken over from Revenue Agent Henry Miller about February of 1954 [R. 334-335]. Mr. Ford gave certain testimony as to what work he had done on the Boren tax matters while employed by the Internal Revenue Service [R. 338-348]. It was developed that the Boren tax matters concerned the wife, Delta Brown and her husband, Clifford Boren [R. 341] and later he, Ford, was assigned to investigate the Boren Corporation returns [R. 348]. Former Agent Ford testified that he estimated the time he was on the Boren investigation to be but seven days [R. 361], and his last day of duty in Internal Revenue Service was September 10, 1954 [R. 364].

Mrs. Delta Boren testified that she was aware that an investigation was being conducted by the Internal Revenue Service, of hers and her husband's income tax affairs for the years 1950 and 1951, and that the first time she talked in person to Mr. Ford was about September 14, 1954; but that prior to that, that is, about September 8, 1954, she had tried to reach Mr. Ford, over the telephone but had been unable to reach him [R. 7-10]. Mrs. Boren stated that Mr. Ford called her by phone on September 13, 1954 and made arrangements to meet with her at her home in San Diego on September 14, 1954. Mrs. Boren stated that pursuant to advice of her attorney, a Mr. Jack Brant, they set up recording equipment in her home [R. 12-13]. This conversation between herself and Mr. Ford was recorded and the substance thereof was testified to by the witness Mrs. Boren.

This first recorded conversation did not include as a participant the appellant Mr. Brandow. A typewritten reflection of this conversation of September 14, 1954, between Mr. Ford and Mrs. Boren, was marked as Government's Exhibit 27 for identification only [R. 14-15].

Mrs. Boren stated that on the following day, September 15, 1954, she had another recorded conversation in her home between Mr. Brandow, Mr. Ford and herself—a typewritten reflection of this conversation, so recorded, was marked as Government's Exhibit 28 for identification [R. 16-17]. We pause to note that the recordings of September 14 and 15 were not too clear, hence they were not played to the jury. A later recording of September 28, 1954 was much better, it was captured on a tape, which tape was played to the jury. The tape of the recording of September 28, 1954 was received into evidence as Exhibit 32 [R. 22 and 85]. It was played to the jury, so they heard its contents. This recording, the tape, Exhibit 32, reflected a conversation at Mrs. Boren's home between former agent Ford, Mr. Rau and appellant Brandow [R. 85] that took place on September 28, 1954. Exhibit 29 for identification only was a typewritten document prepared from the recording of September 28, 1954, containing the conversation that then took place between Mr. Rau, Mr. Brandow, Mr. Ford and Mrs. Boren. For sake of convenience we have attached to the appendix a transcript of this interview of September 28, 1954, realizing that although the document is not in evidence, the tape [Ex. 32] from which it was made is in evidence and if this court desires, a comparison with the tape and Exhibit 29 for identification will illustrate the accuracy of such exhibits contents to the tape recording.

Mr. Rau, an attorney who was introduced to Mrs. Boren on September 28, 1954, was likewise convicted of a false statement count, *i.e.*, Count III. Mr. Rau filed a notice of appeal but later dismissed or abandoned his appeal as the records on file herein will probably indicate.

It should be observed that Mrs. Boren caused the recordings to be made of these three conversations that

took place at her home on September 14, 15 and 28, 1954, at the suggestion of her private counsel and not at the suggestion or instigation of any agent or representative of the government.

To digress, it is but fitting to note the affidavit executed by the appellant Brandow that was charged to be a false statement. It was received in evidence as Government Exhibit 65. A copy of this affidavit or statement is contained in the Appendix to this brief (App. pp. 1-2). This affidavit pertains to conversations taking place at Mrs. Boren's house on September 15 and 28, 1954.

Among other things, Mr. Brandow affirmed that Mr. Ford did not discuss the tax features of the case with him but only gave him background of the Borens and specifically stated in this affidavit.

“That at no time during the discussions I attended at Mrs. Boren's house did Mr. Ford or anyone else state directly, or imply, that Mr. Ford was willing to disclose the Government's case.”

Mrs. Boren testified, with the assistance of the typewritten transcripts, she had made from the recordings of such conversations substantially as follows: [The one of September 15, 1954, whose participants were Mrs. Boren, Mr. Ford and Mr. Brandow.]

That on the afternoon of September 15, 1954, Mr. Brandow and Mr. Ford called at her home. That Mr. Ford described the discussion he had had with Mr. Brandow about the case [R. 67]. That during this conversation Mr. Ford stated he had discussed what he had done on the case, what the Government could do on the case, what could happen if affirmative action were taken, and that Mr. Brandow had seemed interested and felt he could help [R. 68]. That Mr. Brandow asked permission to

ask certain questions that might be personal [R. 69]. That Mr. Brandow stated they did not handle cases for the average person, they only handled cases they knew they could win—that they felt they could win—didn't know whether they could get us off completely or not—but they felt they could do us a lot of help [R. 71]. Mrs. Boren further testified:

“Well, Mr. Brandow said that he understood that there had been unreported income, but that sometimes what the Government called income and what was truly income, by changing the evidence or straightening the facts out and making a better case, by the Government sometimes would not be considered income after all, that the Government wouldn't—wasn't fighting for us and they were fighting for themselves, and they wouldn't try to straighten some of these things out.” [R. 72]. That Mr. Brandow said “Now is the time to kill the case before it got as far as indictment.”—“Mr. Brandow even said they could get me off in a week.” That Mr. Brandow represented that he had been with the F.B.I. [R. 74]. That she, Mrs. Boren, had not known Brandow prior to September 15, 1954, the day he was brought to her house. That he represented the Government was going to prosecute—“And he (Brandow) stated they would get an indictment and a conviction, he was sure, unless we changed the evidence.” That she stated she did not know anything about the case until Mr. Ford had come the day before and told us it was a fraud case [R. 76].

That at one place in the conversation Brandow had said there would be fines as high—“as \$5,000 for each count;”—“To say nothing of a year and day.”—[R. 77]. That he told her they wanted 50 per cent of savings and that she believed Mr. Ford then told him it was about \$110,000 including everything [R. 78]. That Mr. Ford

explained why he had joined up with Mr. Brandow—that they were a very good group, that he Ford had come up against them in his work in the Bureau and they had beat him several times; and he (Ford) felt if he couldn't beat them he would join them [R. 80].

That Mr. Brandow stated:—"The way I understand it from what Charlie (Ford) tells me, there was money that didn't get into the records"—that they discussed how evidence can be changed to show that sometimes this would work out anyway, because of certain ways they can set it up [R. 81-82].

That Charlie (Mr. Ford) had asked Mr. Brandow to talk with her and they were interested in taking the case [R. 83-84].

The first conversation at Mrs. Boren's home in San Diego which was likewise recorded, occurred on the afternoon of September 14, 1954. This conversation did not include as a participation Mr. Brandow. Mrs. Boren's recollection of this conversation between herself and Mr. Ford is reflected, starting with page 34 of the Reporter's Transcript and concluding on or about page 64.

Inasmuch as the tape, Exhibit 32, had been admitted into evidence and was played to the jury, after having first been heard by the Court, the witness Mrs. Boren did not testify as to the particulars of this conversation at her home of September 28, 1954, which included conversation between appellant Brandow, Mr. Rau, Mr. Ford and Mrs. Boren. Appellee submits that a playing of this tape, Exhibit 32, will among many other things reflect the following conversation: [For convenience sake Ex. 29, a typewritten reflection of the tape, which was *only* marked for identification has been included to the Appendix of this Brief (App. pp. 3-30).]

We shall refer primarily to that portion of the conversations that pertains to Mr. Brandow. However, with reference to Mr. Brandow's participation in this conversation, its full import can often only be gathered by the comments of Mr. Rau, or others, who made remarks that were followed by comments of Mr. Brandow.

After Mr. Rau had made an extended remark regarding such as "you want to try and suppress it and limit it to civil liability don't you?" (App. p. 7) and that the tax is now "about a hundred and ten thousand"—and regarding changing evidence, etc., Brandow states "I got it that in about two weeks they're (the Government) progressing at the set-up" (App. p. 9). Mr. Brandow later adds after Mr. Rau had stated to Mrs. Boren "There's too much evidence of wilful fraud. That's all. No questions of income" that he (Brandow) came over here about a week ago after Charlie (Mr. Ford) asked him to come over and talk to Mrs. Boren (App. p. 10). Brandow also stated "You see Mrs. Boren, Charlie here, he has worked for the Government, he's familiar with the case" (App. p. 10). After considerable conversation between the parties, Mr. Brandow is reported to have stated to Mrs. Boren:

"Well, Mrs. Boren, here's the thing: to a certain extent you have a break due to the fact that Charlie just quit and associated with our company. Normally the Government doesn't come and tip you off what their hand is and Charlie isn't as the Government tipping you off, but he's trying to give you a chance." (App. p. 16), and later Brandow remarks:

"Well, I was just trying to tell Mrs. Boren that Charlie here is doing something for her that I don't think she appreciates" . . . "Charles feels sorry for you" and again we hear from Brandow in this sequence:

Mr. Ford: "I know a couple of other contractors here in town who would just love to have the same deal but unfortunately I don't feel sorry for them."

Mr. Brandow: "Do you understand that? He's argued with us to come over here. Normally, you know, we don't have to do that and he's even willing to tip the hand. In other words, we got something this time that normally we have to feel around to get. We know what the case is all interested in." (App. p. 17.) Again Mr. Brandow remarks:—"We are interested in the ones that did, appear to be, which I honestly think you feel in your mind right now that uh, the Government's right because you, you're looking at cash, you're going to, you've got cash that hasn't been reported"—(App. p. 20) and further he states "I mean, you're not just on the surface, you're, you're well, we'll say about three-quarters into the mess. The further in you go the harder it is to get out . . ." (App. p. 21) and later he states, "I reviewed your case. I can see it, and it looks very bad at this stage" (App. p. 22) and in some state of modesty he states, "I haven't lost a case yet, and I wouldn't want to start now." (App. p. 29.)

To conclude Mr. Brandow's participation, we call attention to this, his remark:

Mr. Brandow: "You may know more of the facts than we know, all we know is what the Government knows." (App. p. 29.)

The Government called as a witness Special Agent Francis S. Sullivan of the Internal Revenue Service [R. 193]. He, Sullivan, testified that the first time he and Special Agent Schlick met Mr. Rau and Mr. Brandow was on October 22, 1954 in Mr. Rau's office in Los Angeles [R. 193]. Witness Sullivan stated that he and

Agent Schlick had been assigned on October 13, 1954 by their Chief to investigate charges made by Mr. Wansley and Mr. Brant (attorneys) on behalf of their client, Mrs. Boren, against Mr. Ford, Mr. Brandow and Mr. Rau [R. 203].

Agent Sullivan then proceeded to relate the conversation that was had at Mr. Rau's office on October 22, 1954 between Mr. Brandow, Agent Schlick, and himself. This interview is reflected in the Reporter's Transcript commencing at pages 194 to 198. At this interview he asked both Mr. Brandow and Mr. Rau if they would incorporate their answers in affidavit form and that Mr. Rau stated, "You prepare the affidavits and if we like them we will sign them" [R. 198-199]. The witness then explained that he and Agent Schlick returned to their office and corroborated in drafting the affidavits, and attempted to incorporate in the affidavits the precise language as they had expressed it to them—"the facts that they related to us" [R. 200].

After the affidavits were typed, on October 26, 1954 he (Agent Sullivan) contacted Mr. Brandow, and arrived at Mr. Rau's office at about 3:55 p.m. in the afternoon, accompanied by Mr. Schlick [R. 201]. Soon thereafter they gave Mr. Brandow his affidavit to read, he, Brandow, read it and made a correction on it, and then he (Brandow) swore to the truthfulness of the contents before Agent Sullivan. He, Sullivan, acknowledged the affidavit of Mr. Brandow [R. 202]. [A copy of this Affidavit is noted on pp. 1-2 of the Appendix. It was received as Govt. Ex. 65.]

Upon cross-examination by Mr. Brandow's attorney witness Sullivan stated he was familiar with what purported to be on a recording from a conversation had with

Mrs. Boren prior to first seeing Mr. Brandow [R. 233] and that he also had information from Mrs. Boren of recordings taken at her home [R. 234]. That while he had not told Mr. Brandow that he, Brandow, was under investigation he had told him that they were investigating the complaint filed by Mrs. Boren [R. 234-235] and that his conversation with Mrs. Boren indicated the association of Mr. Brandow and Mr. Rau with the Ford matter [R. 235]. That he wanted Mr. Brandow's—"statement to corroborate, if it would, Mr. Ford's position. Mr. Ford had, in essence, related facts which were similar to what Mrs. Boren told us, but on other matters they were in conflict with what Mrs. Boren told us" [R. 237]. That he had wanted the statement, "Because of the allegations filed with the Internal Revenue Service against Mr. Ford" [R. 238]. That they were interested in determining the facts—"Mr. Boren and Mr. Brant had given us one statement of the incident and conversation that had taken place. Mr. Ford had given us a different one."—Ford had suggested they, the agents, see Mr. Rau and Mr. Brandow [R. 239-240].

That he, Agent Sullivan, didn't know whether the affidavit given to them by Mr. Brandow was true or false, that he knew it was in conflict with what had already been told to them [R. 250].

Mr. Brandow testified. We shall not here endeavor to summarize all of his testimony; this we deem his obligation if the same is deemed pertinent. Mr. Brandow testified that he first talked to Mr. Ford on the afternoon of September 13, 1954 [R. 261]. He, Brandow, relates the conversatoin he said he first had with Mr. Ford [R. 265]. That he was at Mrs. Boren's home on two occasions, *i.e.*, September 15 and 28, 1954 [R. 266]. That on the second visit to Mrs. Boren's house he was accompanied

by Mr. Rau [R. 296]. Mr. Brandow admitted that he recognized some of the conversation of the tape recording that had been played to the jury [R. 297]. That the signature on Exhibit 65, the affidavit, appeared to be his, Brandow's signature [R. 298]. When questioned concerning the conferences at Mrs. Boren's home, Mr. Brandow testified: "Well, Mr. Neukom, you know what I said or didn't say. You have the recordings. I don't recall it" [R. 308].

Mr. Ford, a defendant, who was found not guilty, testified on his behalf. Upon cross-examination Mr. Ford, among other things, stated he first saw Mr. Brandow on September 15, but had a telephone call with him on September 13 [R. 426]. He relates his being assigned to the Boren case for investigation from Agent Miller and that Miller had turned over the facts to him [R. 431]. The witness Mr. Ford identified and there was received in evidence as Government's Exhibit 75 a letter of April 28, 1954. [This Ex. 75 has been copied in the Appendix, p. 31.] This letter was a report by the then Agent Charles D. Ford, the witness, to his superior Mr. Murphy, Supervisor of the Fraud Group. It reports income of the Borens in the form of checks which "was not picked up in income" . . . of dealings in currency by the Borens—and of his, Ford's views that the Borens had attempted —"to evade their just taxes . . ." [R. 436]. The witness Mr. Ford also conceded that when he went to see Mrs. Boren on September 14, 1954 he had uncovered no facts to discredit the comments he made in Exhibit 75, the report of April 28, 1954. That no further work had been done on the case [R. 436-437].

I.

The Statement Taken by Agents of the Internal Revenue Service Was Within Their Jurisdiction.

We shall not here repeat the observations noted in our "Statement of the Case" pertaining to the Internal Revenue Agents Francis S. Sullivan and Walter E. Schlick's assignment by their Chief to investigate charges brought by taxpayer, Mrs. Boren, regarding the activities of Mr. Ford, Mr. Brandow, and Mr. Rau [R. 203]. The section under which this prosecution, *i.e.*, Count II, was brought, 18 U. S. C., Sec. 1001, covers false statement ". . . in any matter within the jurisdiction of any department or agency of the United States . . ." The Internal Revenue Service is surely such an "agency" and a part of the Treasury Department.

This Circuit held in *Cohen v. United States*, 201 F. 2d 386, 392 (C. A. 9, 1953), that a false statement to Treasury agents was covered by 18 U. S. C., Sec. 1001, despite the fact that the offense charged (Count 6) was not brought under Title 26 of the Internal Revenue Code. This court, in referring to the arguments advanced by Cohen referred to *United States v. Gilliland*, 312 U. S. 86 (1941), and in part stated at page 392:

"In *United States v. Gilliland*, *supra*, where a similar argument was made that the Hot Oil Act of 1935 repealed by implication, the application of Sec. 80, the predecessor of Sec. 1001, Title 18 U. S. C. A., to that specific field, the Court held that the broad false statement provisions of Sec. 80 have their place as a 'fitting complement' to other statutes dealing with false statements in a particular field."

The Court in *Cohen* likewise said at page 394:

“ . . . Investigations of income tax matters, as we have noted, is a matter within the jurisdiction of the Treasury Department.”

On page 5 of appellant's brief there is a quotation of Section 4003 of the 1939 Internal Revenue Code. Appellant fails to call attention to a more specific section of this same code, that is:

“26 USC Sec. 3654, *General Powers and Duties Relating to Collection*. (1939 Edition.)

(c) *Internal revenue agents*. Every internal revenue agent shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. 53 Stat. 446.”

The duties and powers above provided for expressly conferred upon Agents Sullivan and Schlick to do precisely what they did, both in interviewing Brandow respecting a complaint made and in securing the affidavit that Brandow signed, *i.e.*, Exhibit 65. The above quoted subsection (c) of Section 3654 of the 1939 Code, while not expressly restated in the 1954 Internal Revenue Code, remained in effect until January 1, 1955 by reason of the provisions of Section 7851(a)(6)(B) of the 1954 Code.

A recent opinion discusses the “savings clause” embodied in the Internal Revenue Code of 1954 and the further fact that the 1939 Code was not repealed until January 1, 1955 (which date was subsequent to the date of the instance offense). We refer to: *Levister v. United States*, 260 F. 2d 485 (C. A. D. C., 1958).

Appellant places reliance upon the *Levin* case, 133 Fed. Supp. 88. This case, like the *Stark* case, 133 Fed. Supp. 190, is discussed but not adhered to in *Knowles v. United States*, 224 F. 2d 168, 171 (C. A. 10, 1955). The *Knowles* case concerned a false and fraudulent statement made to an internal revenue agent. The Court held that such a statement was a statement "made within jurisdiction of the department or agency of the United States." In *Knowles*, the court preferred to follow the rationale of this Court in *Cohen*, *supra*, and that of *Marzani v. United States*, 168 F. 2d 133, *aff'd* 335 U. S. 985, to that of the reasoning of either *Levin* or *Stark*, *supra*. *Levin*, *supra*, is also distinguishable from the instant case, for in *Levin* the District Court appears to hold that the statement, not made under oath to an F.B.I. agent, was therefore not covered by 18 U. S. C., Sec. 1001. Here the statement given by Brandow, Exhibit 65 (App. pp. 1-2) was in affidavit form.

The same problem has been the subject of a recent opinion by one of the District Judges of this circuit. We refer to *United States v. Van Valkenburg*, 157 Fed. Supp. 599 (D. C. Alaska, 1958). In the *Van Valkenburg* case the Court ruled that a false statement made to an Assistant United States Attorney to induce action against a third person was a situation covered by this Section 1001 and a matter within the jurisdiction of the office of the United States Attorney. It also was not necessary that the statement be made while under any legal obligation to speak. The Court, in the *Van Valkenburg* opinion referred to *Levin* and *Stark*, *supra*, and was not convinced by their reasoning. The Court preferred to be guided by this Court's *Cohen* opinion, *Marzani*, *Gilliland* and other authorities noted in such opinion, including a more recent

decision of this circuit—*De Casaus v. United States*. We quote from page 602 of *Van Valkenburg*:

“In *De Casaus v. United States*, 9 Cir., 250 F. 2d 150, the offense charged against the defendant-appellant was violation of 15 U. S. C. A. §714m, in that the defendant-appellant made a false statement to an investigating officer of the Commodity Credit Corporation. In that case the court said:

‘Appellant asserts that the statute which he is charged with violating does not apply to statements made to investigating officers. Arguments to that effect have been universally rejected in cases involving like statutes.’ Citing *United States v. Gilliland*, *supra*; *Cohen v. United States*, *supra*; *Marzani v. United States*, *supra*.

The opinion of the *De Casaus* case has just been issued in our own circuit and added weight should be given to their expression on the subject even though the case is not based on section 1001. It seems clear that they agree with the cited cases as set out in this opinion.”

The statute, 18 U. S. C., Sec. 1001, is very broad and does not require that the false statement be made in a document required to be submitted or in questions required to be answered. To illustrate the broad scope of the statute, the case of *Marzani v. United States*, 168 F. 2d 133 (C. A. D. C., 1948), *aff'd without opinion*, 335 U. S. 895, 69 S. Ct. 299, is referred to in which the question before the Court is set out on page 141 of 168 F. 2d as follows:

“The issue is whether the statute can be constitutionally applied to a prosecution for statements not required to be made, not under oath, not stenographically transcribed, never reduced to writing, made at

a private conference initiated wholly at appellant's request, which he was not required to attend, solely to ask the reasons of his superior in the government for a request which had been made for appellant's resignation, where the only two participants in the conference addressed each other throughout by their first names and discussed a wide variety of other topics, where no suitable notice was given by regulation or otherwise of the consequences of knowingly and wilfully making any false or fraudulent statement, and where the statute provides criminal penalties for false and fraudulent statements made 'in any other matter within the jurisdiction of any department or agency of the United States.' "

The Court in *Marzani* answered this question on page 142 of the opinion as follows:

"The pertinent statute does not limit the offense to formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations, * * * in any matter within the jurisdiction of any department or agency of the United States.'

* * * * *

"We see nothing vague about the language 'false or fraudulent statements or representations' nor any ambiguity in the language 'in any matter within the jurisdiction of any department or agency of the United States' which would place in doubt the requirements that a government employee, discussing officially with his superior an official request for his resignation, must be truthful."

As previously noted, the Court of Appeals for the Ninth Circuit answered this same question adversely to

the appellant in *Cohen v. United States*, 201 F. 2d 386, cert. denied 345 U. S. 951, and further stated that Section 1001 applied to revenue matters and was not repealed by implication or otherwise by Section 3809 of the Internal Revenue Code of 1939. In the *Cohen* case, defendant signed a net worth statement at a conference with Treasury agents. The net worth statement which was prepared by Cohen's accountant was proven to be false in many respects and defendant was thereafter convicted of submitting a false statement to the Treasury Department in violation of Section 1001.

In *Cohen*, this court stated at page 391:

“ . . . It will not suffice to distinguish the cases, as appellant urges, by noting that in the Marzani case the government employee discussed ‘officially’ with his superior an ‘official’ request for his resignation. The point is that the statements, as here, were voluntarily made.”

The present case is quite similar to the *Cohen* case. Other cases in point are:

United States v. Meyer, 140 F. 2d 652 (C. A. 2, 1944);

United States v. Heine, 149 F. 2d 485 (C. A. 2, 1945), cert. den. 325 U. S. 885, 65 S. Ct. 1578;

United States v. Barra, 149 F. 2d 489 (C. A. 2, 1945);

United States v. Myers, 131 Fed. Supp. 525 (D. C. Cal., 1955).

A recent opinion of this Court with reference to “jurisdiction” under this same section, 18 U. S. C. 1001 is *Clair Daniel Pitts v. United States*, F. 2d (C. A. 9—Jan. 27, 1959).

II.

The Statement Made by Brandow—Found by the Jury to Be False—Was Material to the Agents Investigation. Materiality Does Not Seem to Be Always Required Under Section 1001.

It appears that the materiality of the false statement signed by appellant is evident from the facts set forth in this brief under our heading "Statement of the Case." What has previously been said regarding jurisdiction is germane to this subject.

The question presents itself as to whether the false statements made by Brandow were false regarding a material fact and whether the statute specifically requires that a material fact be falsified. In the instant case, there is no doubt that the answers were false as to the very fact that the agents were properly investigating, namely the offer to disclose the Government's case. There is authority to the effect that the statute does not require that the statement be false as to a material fact, as it makes it unlawful to "knowingly and willfully . . . make . . . any false or fraudulent statements . . . in any matter within the jurisdiction of any department or agency of the United States. . . ."

In the recent case of *United States v. Silver*, 235 F. 2d 375 (C. A. 2, 1956), which is very similar to the present case in that it involves false statements made to a revenue agent during an investigation, the Second Circuit held that there is no requirement of materiality beyond the explicit elements of the crime as defined in the statute.

Whether correct or not, in *Silver, supra*, the Court differentiates the clauses of Section 1001 with respect to the necessity of materiality, holding that a false statement does not require materiality in a matter of fact willfully

mistated in a field of appropriate governmental inquiry. The court's discussion and distinction on this subject of materiality is noted on pages 337-378 of *Silver, supra*:

“But a majority of the court believe further that there is no separate and additional requirement of materiality, beyond the explicit elements of the crime as defined in the statute, which must be shown to complete proof of the offense. Since the cases above disclose some diversity in approach, we are met with no binding precedent and therefore turn to the statute itself. We suggest that it is of doubtful wisdom, not to say potentially dangerous, to import conditions into a penal statute which appear to have been studiously omitted by the lawmakers themselves. Even if the reason for including the requirement in the first clause and omitting it in the later clause could not be discerned, it would nevertheless seem that the differences must still be observed. But there is properly a distinction between a scheme of concealing or covering up a ‘material fact’ and the making of a false, fictitious, or fraudulent statement. An attempt to conceal or cover up may properly be limited only to facts which are important and material. On the other hand, a fact deliberately or willfully misstated in a matter of appropriate governmental inquiry seems properly punishable even if it is only a gratuitous red herring. As such it can of course obstruct, delay, or deflect an inquiry which is pressing home to uncover fraud upon the government. So here the defendant’s lies as to his use of an assumed name and as to the dates when he saw Carol Anderson were disruptive of the government’s search for the facts; they should properly be subject to punishment even if their connection with the purpose of the inquiry does not immediately appear, without necessity for formal explanation as to why the questions are important.

It must be remembered that in any event the charge must concern a 'matter within the jurisdiction of any (i.e., some) department or agency of the United States.' In all probability a lie in a matter within such jurisdiction will rarely, if ever, prove to be really immaterial; this initial requirement, coupled with the need of proving willful intent, will prevent the possibility of purely foolish or wholly insubstantial charges. But even if this is so, it is but an added reason against importing into the statute an unnecessary but vague abstraction which will then in turn call for interpretation and reinterpretation. *United States v. Gilliland*, 312 U. S. 86, 93, 61 S. Ct. 518, 85 L. Ed. 598, applying the broad language of the statutory provision in declining to restrict it to cases involving pecuniary or property loss to the United States, lends support to this view. Incidentally this simpler and more direct interpretation of the statutory intent will eliminate the basis for such purely technical objections as the one advanced by the defendant here. Accordingly we overrule the defendant's first assignment of error."

Compare:

United States v. Okin, 154 Fed. Supp. 553, 555 (D. C. N. J., 1955).

This court in *Cohen*, has held that the government is only required to prove that the statement be false in one material respect. (*Cohen v. United States*, 201 F. 2d 386, 393 (C. A. 9, 1953), *cert. denied* 345 U. S. 951.)

Among others appellant relies upon the case of *United States v. Moore*, 185 F. 2d 92 (C. A. 5, 1950). With this case we have no disagreement. However, in the instant case, the facts clearly indicate that Agents Sullivan and Schlick of the Internal Revenue Service were

clearly performing duties within their assigned field,—such investigation, the conference had with Mr. Brandow on October 22, 1954 and the subsequent affidavit of October 26, 1954—were all within their jurisdiction—their appropriate field of inquiry.

A. Materiality—Further Discussion Thereof—and as Compared to the Function of the Grand Jury and Administrative Agencies Conducting Investigations.

In a prosecution for filing a false statement in a deportation proceeding, the materiality was to be determined in the light of the circumstances which existed when the statements were made, rather than upon the fact that the proceedings were dropped. (*United States v. LaRocca*, 245 F. 2d 196, 199 (C. A. 3, 1957).)

In a logically relevant case, the Supreme Court has recognized the similarity between the functions of a grand jury and that of an administrative agency in conducting an investigation. We refer to *United States v. Morton Salt Co.*, 338 U. S. 632, 642.

The *Morton Salt* case concerned itself with investigations of the Federal Trade Commission, which was making an investigation as to whether there was a probable violation of the law. With respect to action of an administrative agency, the Court stated at page 642:

“The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an *administrative agency* charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. *It has power of inquisition, if one*

chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.” (Emphasis ours.)

Compare: *Westside Ford v. United States*, 206 F. 2d 627, 632 (C. A. 9, 1953):

“The standards of materiality or relevancy are far less rigid in an *ex parte* inquiry to determine the existence of a violation of a statute than those applied in a trial or adversary proceeding.”

For a discussion of perjury before a grand jury and the broad scope of the inquiry permitted, and even the fruitlessness of such inquiry as still not preventing the offense of perjury, see *United States v. Neff*, 212 F. 2d 297 (C. A. 3, 1953) (*Rev'd on other grounds*).

Another case in point is *Carroll v. United States*, 16 F. 2d 951 (C. A. 2, 1927). This case pertains to perjury in testimony given before a grand jury. The Court held that it is sufficient if the testimony tends to influence or impede, or dissuade the grand jury from performing its investigation, pointing out that a false statement by a witness in any of the steps, though not relevant in an essential sense to the ultimate issues pending before the grand jury, may be material in that such testimony may tend to influence or impede the course of the investigation. At page 953:

“A false statement by a witness in any of the steps, though not relevant in an essential sense to the ulti-

mate issues pending before the grand jury, may be material, in that it tends to influence or impede the course of the investigation. This materiality has been recognized by the courts. (Citing many cases.) The test of materiality in a grand jury's investigation is whether the false testimony has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation, and, if it does, an indictment for perjury may be predicated upon it."

Again, at page 954:

"The plaintiff in error's statements were plainly calculated to dissuade the grand jury from further investigation. It would distort the plain meaning of the word 'material' to hold otherwise. His statements were deceptive; they were influential, for the accusing finger was directed at him. Had he answered the question truthfully, he would have furnished a clue to the grand jury tending to establish a violation of the National Prohibition Act."

To similar effect concerning test of materiality, *United States v. Moran*, 194 F. 2d 623, 626 (C. A. 2, 1952) (Perjury prosecution for testimony before a Senate subcommittee).

We submit that there is an analogy between an alleged false statement offense and that of the offenses of perjury and subornation of perjury.

Doan v. United States, 202 F. 2d 674, 679 (C. A. 9, 1953) pertained to perjury and subornation of perjury before a grand jury. The *Doan* case holds that for subornation of perjury to be material, it is not necessary that the false statement should bear directly on the main issue, but if the statement is corroboratively or circumstantially

material, or has an ultimate tendency to prove or disprove any material facts in the chain of evidence, it is material even though in itself and standing alone, it might be insufficient to establish the principal issue in the case. In the *Doan* case, reference is made to *Luse v. United States* (C. A. 9), 64 F. 2d 776, where it was held that testimony respecting a transaction which occurred after indictment had been returned, and which therefore could have had no tendency to prove any issue made by the indictment, but which was important in judging the credibility of the witness, was material.

Woolley v. United States, 97 F. 2d 259 (C. A. 9, 1938), *cert. denied* 305 U. S. 615 (Perjury). This case pertained to testimony given in an *ex parte* hearing before the Security and Exchange Commission. This case holds that a tendency to influence the Commission in its investigation was sufficient. The test for materiality is whether the false testimony has a natural tendency to influence the fact-finding agency in its investigation. The scope of whose inquiry is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation.

Seymour v. United States, 77 F. 2d 577 at 583-584 (C. A. 8, 1935) (Perjury). This case pertained to testimony taken by a Senate Investigating Committee. The fact that the action of "encouraging" a candidate *was not illegal* did not make the testimony immaterial. In other words, the Court points out that the testimony was germane to the inquiry.

United States v. Goldstein, 168 F. 2d 666, 671 (C. A. 2, 1948). Perjury committed while defendant was being examined under oath by a special agent of the Treasury Department in a proceeding to determine the tax liabilities

of a certain company. Among other things, the Court stated at page 671:

“And it is of no consequence that truthful statement by appellant might not have resulted in making the investigation more successful than it was. *United States v. Hirsch*, 2 Cir., 136 F. 2d 970.”

III.

The Recording, Exhibit 32, Was Properly Admitted.

It should be recalled that only one recording, that is the tape, Exhibit 32, of the conference of September 28, 1954 was admitted and played to the jury. The circumstances of the taking of this recording was fully explained by the witness, Mrs. Boren. [See also R. 85.] The court permitted a *voir dire* examination of Mrs Boren respecting the recordings, which commences at page 25 of the Reporter's Transcript. Effort was made to discredit the recordings, inquiry was had as to where they had been kept, and as to whether they had been tampered with or cut, etc. [R. 28.] Although the defense secured permission from the court to have the recordings examined by an expert, the defense at no time exercised the permission granted, thus the recordings stood with no adverse testimony as to their reliability or accuracy.

The courts, including the Federal Courts, have frequently sustained the admissibility of recorded conversation. To such effect see: *Monroe v. United States*, 234 F. 2d 49 (C. A. D. C. 1956); *Schanerman v. United States*, 150 F. 2d 941 (C. A. 3, 1945). In the *Monroe* case, which is a recent case, the Court admitted the recordings, even though several portions were unintelligible. The Court stated that the recordings should be admitted with the comment at page 55:

“Unless the unintelligible portions were so substantial as to render the recording as a whole un-

trustworthy the recording is admissible and the decision should be left to the sound discretion of the judge.

* * * * *

“Here the trial judge followed the correct procedure of having the records played out of the presence of the jury so that he could rule on any objection raised by defendants before the jury heard the recording.”

The question of the admissibility of recordings has not been commented on by the Supreme Court. However, in *On Lee v. United States*, 343 U. S. 757, 72 S. Ct. 967, the Court held that a police officer, who listened to a conversation by means of a wireless receiver, could testify as to the contents of that conversation.

See also:

United States v. Perina, 218 F. 2d 62 (C. A. 2, 1954) (Narcotics, conversation overheard by Government agent employing electronic device);

Goldman v. United States, 316 U. S. 129, 135 (Dictaphone placed against a wall);

Zamloch v. United States, 193 F. 2d 889 (C. A. 9, 1952) (Conspiracy to defraud the United States of its lawful powers in due administration of justice—wire recordings);

People v. Porter, 105 Cal. App. 2d 324, 331; 233 P. 2d 102 (Murder trial—a rerecording of portion of original recordings);

People v. Jackson, 125 Cal. App. 2d 776 (1954); 271 P. 2d 102 (Robbery—the fact a recording may not be clear in its entirety does not require its exclusion).

In the recent case of *United States v. Klosterman*, 147 Fed. Supp. 843, 849 (D. C. Pa., 1957), the Court held that it was proper to admit a recording obtained by a

device concealed on the person of an agent and of which the defendant was unaware, and that the weight of such recorded conversation was for the jury.

Conclusion.

It is respectfully submitted that the Judgment should be affirmed.

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Attorneys for Appellee, United States of America.





APPENDIX.

Government's Exhibit No. 65.

Affidavit of Del L. Brandow.

United States of America)
Southern District of California) ss.

I, Del L. Brandow, being first duly sworn, on oath depose and say:

That I am 41 years of age, married, have three children, reside at 1156 Descanso Drive, La Canada, California,

2857 DB

and by occupation a tax analyst with offices at 2865 Colorado Boulevard, Los Angeles 41, California, telephone Cleveland 6-3121;

That I first met Charles D. Ford at his offices in San Diego, California, on September 13, 1954, when I proposed that he associate with me on cases in that area; that I had not previously contacted Mr. Ford on this or any other matter;

That Mr. Ford called me on Tuesday, September 14, 1954, and stated that he would associate with me and we arranged to meet on Wednesday to discuss a case in Vista, California, which had become very urgent;

That on Wednesday, September 15, 1954, Mr. Ford traveled to Oceanside, California, by Greyhound bus and met me, and we proceeded to Vista, California, in my automobile;

That during the drive to Vista, Mr. Ford told me that Mrs. Boren had contacted him on Tuesday, September 14, 1954, and requested that he represent her in the tax matter pending before the Department; that he said that he could not do so because of regulations but that he suggested me; that I agreed to talk to Mrs. Boren and when

our work in Vista was completed we returned to San Diego where I met Mrs. Boren at her residence;

That Mr. Ford did not discuss the tax features of the case with me but only gave me the general background of the Borens, e.g., they were contractors in the building or construction field and at the present time were divorced or separated;

That during the discussion with Mrs. Boren I got the impression that she knew nothing about the case although she did mention a proposed deficiency of about \$100,000.00; that it appeared that Mrs. Boren was trying to get information from Mr. Ford; that during the conversation we mentioned Mr. Rau, an attorney, and Mrs. Boren said that she would like to meet him; that we said that we would try to arrange an appointment the next time Mr. Rau was in San Diego on business;

Than on September 28, 1954, Mr. Rau was in San Diego on another matter and agreed to see Mrs. Boren; that Mr. Ford and I accompanied Mr. Rau to Mrs. Boren's home; that after much discussion of the case Mrs. Boren still appeared to have no knowledge of her case and was trying to find out about it from us;

That at no time during the discussions I attended at Mrs. Boren's house did Mr. Ford or anyone else state directly, or imply, that Mr. Ford was willing to disclose the Government's case; and that

I have read the foregoing statement in its entirety; I understand it; and it is true.

/s/ Del L. Brandow

Subscribed and sworn to before me
this 26th day of October 1954.

/s/ F. S. Sullivan, Special Agent

Government's Exhibit No. 29 for Identification Only.
A Transcript Made of Exhibit No. 32, the Tape
Recording Taken September 28, 1954.

September 28, 1954

Mr. Ford: Mr. Rau, Mrs. Boren.

Mrs. Boren: How do you do.

Mr. Rau: Glad to know you I'm sure.

Mrs. Boren: Won't you sit down. This time I just got my nose cauterized.

Mr. Rau: You've been sick, is that right?

Mrs. Boren: Oh, yes.

Mr. Rau: More or less—

Mrs. Boren: I just got in from the doctors and they just cauterized my nose. I can hardly talk.

Mr. Rau: What did you have, sinus trouble? Or some respiratory infection or—

Mrs. Boren: Oh, I don't know, except it all hurt.

Mr. Ford: (Laugh)

Mrs. Boren: I had sore throat, cold and I've just been sick.

Mr. Rau: Well, my little girl was out of school all last week. Doctor said she might get pneumonia if she went back so she stayed home and took a lot of antibiotics and stuff. The whole week had terrible cough. My wife was sick for about four days. She got up Sunday finally, she's still feeling very lousy.

Mrs. Boren: Uhuh.

Mr. Rau: Must be a lot of that stuff running around.

Mrs. Boren: Yah, there is. Those antibiotics run you down so that—

Mr. Rau: Yah, something like the old sulpha drugs. You remember they claimed you couldn't drive a car, and couldn't do a lot of things.

Mrs. Boren: Yah.

Mr. Rau: —when you were taking them.

Mrs. Boren: Those bring out dizziness.

Mr. Rau: Yah, that's right.

Mrs. Boren: They're not like that now but—

Mr. Rau: Well, I talked over this situation here with these gentlemen here Mrs. Boren and I'm somewhat conversant with it. You know how we handle these matters I suppose, don't you? And you know the situation I suppose from having had it outlined to you and conversant with it.

Mrs. Boren: What do you mean by conversant?

Mr. Rau: Well, I'm halfway familiar with it from having talked this over—

Mrs. Boren: Oh, I see.

Mr. Rau: —with these gentlemen here.

Mrs. Boren: Unhuh.

Mr. Rau: And only general remark that I would make about it is that you're in a situation where you're in a lull before the storm and if you're sensible, in my opinion at least, and I think anyone would agree with me that that's the time to make preparations for what may come later. To be frank about it, from my understanding you're in the soup kettle without any question. Is that right? Isn't that your belief?

Mrs. Boren: Well, see, we don't—now the only thing we know is that Mr. Ford has come over and said that there's ah, about ah, well about a hundred and ten thousand maximum right now that they have in mind but we've never gone over that.

Mr. Rau: Well, as I understand the facts, if this case is prosecuted a conviction is sure. In the state of the evidence, the way it is now. You can start from there. There isn't any question about that at all as far as looking at the facts are concerned. There's no question about it. Now I don't know whether you agree with that or not. But that's my opinion.

Mrs. Boren: Well, I don't know—

Mr. Rau: Well, I say it's a certainty.

Mrs. Boren: Well, I mean they've never given us what they are talking about.

Mr. Rau: The only thing you can do—They've never what?

Mrs. Boren: They've never even given us what they are even talking about.

Mr. Rau: Well, of course, I take it for granted—

Mr. Ford: In things like this it isn't the policy of the government to warn you in advance.

Mr. Rau: Naw, of course not. I take it for granted that you're just as conversant with the facts as the government, in fact maybe more so. Because they have to get them by delving into them and, of course, you're aware of them as things go along. So to put it briefly, the way the situation is now, if an indictment is found there'll be a conviction. Now the only thing that might prevent that and there's no certainty it'll be prevented at all, you might be able to create a backfire before it gets to there, that will change the existing evidence. If the evidence is left as it is an indictment will issue without question and you will be convicted if you are tried. You'll be wasting time in Court on such a case. You would be better off to plead nolo contendere just not a guilty plea, but it's practically equivalent to it. The way the thing is now

the only thing that you can do is try and change the existing evidence. That's all. Before it comes to that. If you sit back now and do nothing and wait until the government takes action, why you're in that's all. It's as simple as that. It's a very simple case from the standpoint of generalities. So the only thing that we're interested in is in doing work which will change the—

Mrs. Boren: Honey, you go home, she's not here now. Little people there all over the place.

Mr. Rau: You have some children?

Mrs. Boren: Yes.

Mr. Rau: How old are they?

Mrs. Boren: Four and six:

Mr. Rau: Oh, I took one who is five last night to see Peter Pan here in Los Angeles. You know that thing with Mary Martin in it. She's very good. Mostly old people. Of course, he's too little to really go at night. I didn't have a chance to do it on a matinee. They're all sold out. You'd be surprised even the thing was pretty well jammed last night, even for a Monday.

Mrs. Boren: Oh, yah.

Mr. Rau: It's very appealing to kids. That's the reason it's such a wonderful play.

Mrs. Boren: We can't get tickets unless we get them weeks ahead of time so I didn't try.

Mr. Rau: Well, at any rate this is a matter of common sense when you're in a situation like that. Sometimes you can't do anything about it. In a lot of ordinary criminal cases, there isn't a whole lot that can be done because you can't exactly manufacture evidence and you can't suborn perjury too effectively, at least it isn't recommended by people who handle cases properly and it isn't always possible even if you want to. So, you've got a situation

in the case of criminal matters involving taxes where it is possible to somewhat change and in fact sometimes radically change the existing evidence with out doing anything that involves perjury or fraud, or anything of the sort. It's a question of just taking the facts and twisting them, let's say putting them into another mold. So that they have a different connotation when you get through with it. That's the situation that you're in now where you have to do something like that or you're just out of luck, that's all. The way it is now. Is there any question in your mind, Charlie? There wouldn't be any defense to it. I mean, the way it is now you, that's it! It's just a question of waiting around until something happens, that's all. Now, that's one course that you can pursue. The other course is that you can try and straighten out your past business records and dealings and information and present something else to the government. Now, of course, along with this goes the fact that having some ability—uhum—to deal with the people who represent the government, without being any more explicit about it, and that doesn't mean buying off anybody, or doing anything that's wrong, but it means doing something that gets results, that's all.

Mrs. Boren: Uhum.

Mr. Rau: That's not a payoff proposition. That's not selling you on the idea that you got to grease somebody's palm and yet it is an effective part of preparing this type of case, to mitigate the ultimate outcome of it. In other words, what you want to do, you don't want to have an indictment, even if you could beat the damm thing, you don't want to go to trial on a case and you can't beat it the way it is now but you don't—if you can you don't want to think of such a thing. You want to try and suppress it and limit it to civil liability, don't you? I mean

that's your desideratum, that's your ultimate desire, is to keep clear out of court, not have any indictments at all. Well now, you can accomplish two things together. You can minimize the amount of civil tax liability whether it comes from ordinary tax liability or penalties and interest, or whatever, which is now at about a hundred and ten thousand, and it's to be hoped for that in the process you can also make the picture so poor from the standpoint of the government that they won't consider any criminal prosecution. So you kill two birds with one stone. You save yourself money on the taxes that you might have to pay and you keep out of court on a criminal charge. See, they both go together. Because if you can change the evidence factor sufficiently that the government doesn't feel they have an ironclad case they're going to lose interest in a criminal prosecution. And if in doing that, you do it by knocking down the amount of taxes—uhhum—creating quite a bit of doubt as to what's due and why you're in a position of compromising on an ordinary civil basis. That's what you should do. That's the position you're in. Now, the only thing that remains is do you want to take the attitude that you have something, of course, you have to be convinced that you're in a situation that calls for something serious in the way of effort to take you out of it. If you are not convinced of that then it's a waste of time to even talk about it. If you want to feel like an ostrich burying its head in the sand, that, we will wait and see what happens, and in lots of cases that's possible, see, but you're not in that kind of position. But if you want to do that then you can just stick around during this lull and wait until the office starts going into it, because the thing isn't completed yet actually. Something more may be turned up.

Mr. Brandow: I got it that in two weeks they're progressing at the set-up.

Mr. Rau: Hun?

Mr. Brandow: In two weeks, they're they're set up, I think.

Mr. Rau: Two weeks? Well, whatever it is, it doesn't make any difference.

Mrs. Boren: What do you mean in two weeks they're set up?

Mr. Rau: There will be a wind-up on the investigation.

Mr. Brandow: In two weeks they're starting in again on it.

Mrs. Boren: Oh, starting?

Mr. Brandow: Gonna prosecute. See, you haven't got much time.

Mr. Ford: No.

Mr. Rau: So, if you want to wait on the thing, you can wait until then and you can figure on going to court. In which case, you're a cooked goose. The court is not the place for you.

Mr. Brandow: Well, you see, that's all we do is tax work and we have access to certain records.

Mr. Rau: I'm a lawyer. I can tell you that, my God, if you got cases, and you got people cold, there isn't any question about it. Now there still is a difference in punishments that are meted out to people depending upon what the magnitude of the thing is and on how sure you can be that the effect of some of their activities has been clear fraud with clear knowledge of it. There is a difference naturally in the attitude that a judge takes as far as penalties are concerned so you can do something sometimes in court, a little bit. But you're not going to be able to

escape conviction. That's your main desire and that you won't be able to do. It's not, not the way the evidence is now. No question about it. And I assume you know that.

Mr. Brandow: Well—

Mr. Rau: There's too much evidence of willful fraud. That's all. No questions of income.

Mr. Brandow: Well, Bill, here's the thing, uh, I haven't, you know I've been out of town, I haven't been able to talk to you, but I came over here, Charlie asked me to come over here about a week ago and I talked to her and I don't think Mr. Boren realizes, thinks she's in trouble—

Mr. Rau: Well, that's it, that's what I told you, if you don't think you're in trouble, there isn't any point in talking about it. Because you got to be in a situation where it calls for, this is like what you might say, a medical case. If, for example you require radical surgery but the doctors can't convince you of it, well, you just go along until something happens, that's all. Then it's probably—

Mr. Brandow: You see, Mrs. Boren, Charlie here, he has worked for the government, he's familiar with the case. He knows where it's going. He sees the ramifications, but for some unknown reason you folks evidently don't understand it, don't appreciate it. Either you definitely haven't done anything, I can't visualize that when the government has such a case, or, hun—

Mr. Rau: Oh, well, you know that isn't true at all, obviously not what has been outlined in this case.

Mr. Brandow: No, well, what I'm getting at, I got the impression the other day, I may be wrong, I got the impression you weren't interested. That's why I didn't bother to talk no more and I left.

Mrs. Boren: No, that wasn't the exact fact, as I say, until Mr. Ford called we had no idea that, we still don't know what—

Mr. Brandow: Well, Charlie, he's hammering at us, he wants us to see if we can help you but, well, we can't help a person—

Mr. Rau: Do you have an attorney or an accountant or somebody that's been taking care of your work through these years here that has advised you about the things and so forth that you can go down to and find, and what not—

Mrs. Boren: Well, they just started work on it and they never, Mr. Ford, we were talking about, he was coming back in about so many weeks, and they were going into it. Now, that's the only, they had one little—

Mr. Rau: Well—

Mrs. Boren: —session, of nothing that I'd, nothing, no facts of the case.

Mr. Rau: Of course, here, let me remind you of this, as any lawyer knows, about the last person on earth to tell him the truth is his own client. I mean, you find that out through the years. It shouldn't be that way but it is that way in too many cases. So I wonder if your attorney, or your accountant, or whoever is representing you, knows all the facts himself about your business operations in the past. Does he even know as much as the government does? Has he been doing it for several years, whoever is representing you?

Mrs. Boren: Our accountant has nursed us from the beginning.

Mr. Rau: Well, what's his comment on the situation?

Mrs. Boren: Well, he hasn't made any comment.

Mr. Rau: Hasn't made any, huh?

Mrs. Boren: No.

Mr. Rau: You've never consulted him about what amount is involved or what is in the offing, or anything of the sort, or—

Mrs. Boren: No, we haven't gone into it.

Mr. Rau: He's never expressed any opinion?

Mrs. Boren: No.

Mr. Ford: That's Harrison, is it?

Mrs. Boren: No. Mr. Urner.

Mr. Ford: Oh, Urner, Yes, that's right.

Mrs. Boren: He had one meeting with Mr. Ford, was giving him some of the answers that the government seemed to have requested and, uh, and Mr. Ford said that he was real busy at the time and couldn't work on it or something right then, and I don't know what—

Mr. Ford: Well, as I told you, I sometimes put up various excuses just to keep somebody out of my hair, or out of what used to be my hair, so I can go ahead about my work and not have a lawyer or an accountant breathing down my neck wanting to know what I'm doing.

Mrs. Boren: Well, he said you weren't interested right then and, in getting any of this data on it, or something, I don't know. You were working on something else right then, you weren't working on it, I don't know. That was as far as its ever gone.

Mr. Rau: Well, you know enough about life, you've lived a certain number of years. You know that that's true in all criminal cases. The people who are investigating, they don't go and tell the defendant everything they are going to do, quite the reverse. A tax case in that respect is not different than any criminal. They complete their investigation, all phases of it possible now, when

they complete, it's true, in order to get a confession or an admission they may confront the defendant with it at that time. But up to that time they're not going to tell the defendant what it's all about, not until the case is fully prepared.

Mrs. Boren: You, your firm works with them, has, can, in other words, discuss it with them and go into it with them, is that—

Mr. Rau: Well—

Mrs. Boren: You're so used to working with them and all, is that the point?

Mr. Rau: It's quite obvious. Yes, it's a very favored position it is, insofar as having access to information which isn't always available. Not in any illegal way or anything of the sort, but is just simply exists, that's all. So you've got some opportunity to take countermeasures as far as somewhat mitigating the effect of it or maybe changing the whole complexion of it. Now as I say, that does two things—it cuts down on tax liability, which I would say you should be very glad to take. What's been done so far, this hundred and ten thousand dollar figure. You should probably be glad if you could stay out of court to deal on a basis of making a settlement on the civil tax side of it if you could without any criminal prosecution. You would be well advised to jump at it. But you're not going to be allowed to do that because in face of the facts you are going to have a prosecution too. The only way that you are going to avoid that is by knocking this thing way down and introducing doubt, sufficient doubt so that the government will decide in the exercise of its discretion not to prosecute but to settle the tax, the residual tax liability. But the important thing, as I said before, is to realize, which perhaps you are a

little adverse to saying, it doesn't matter so long, as long as you do realize it, I don't care whether you want to admit it or not but you are in a serious predicament that you face now a prosecution that can't fail if you go to court on it with the evidence which the government now has, you are going to be convicted of tax evasion without question. Now that, you take that as a basis to start from, if you don't have that basis you may feel differently if you've got just mere civil liability and you are going to argue about the amount of it, come up with some kind of disposition, that's something else, but you're not in that kind of a position, not at all.

Mrs. Boren: Well, as I say, the first thing we heard actually, materially about it was when Mr. Ford called me and told me that he had this attorney friend and had had a lot of discussion, discussion about it, and I talked with Mr. Brandow here and I told them how that I would like to meet you and see. After all, you, you would be the boy handling the job, I'd like to know who you were and so forth, if we decide to uh—

Mr. Rau: Well, uh, handling the job officially as far as, as far as representing you actually before the Treasury Department, but also with these gentlemen doing work in connection with your records that has to be done. That's going to be, that's going to have to be the fundamental approach. You can't rely upon the facts as they exist. The facts I don't say have to be lied about, but they have to be modified in such a way that they speak differently than they do now so that—

Mr. Brandow: Well, maybe I can explain. Mrs. Boren, here's the thing. Lots of times taxpayers misrepresent facts innocently. I mean they look at them differently from what the facts actually are taxwise, under tax laws. Lots of times we are able to help people by getting

a true construction of the facts, breaking the facts apart and getting it down to something besides accumulated picture.

Mr. Rau: Well, from a criminal standpoint, you have got to create ambiguity, fundamentally, see. If it's an open and shut deal and the persons present the acquisition of taxable income, the revenue, there isn't any question about it. If it isn't an open and shut deal, if there is some ambiguity, if there are two explanations for it, then you've got something that defeats criminal prosecution, because it will defeat the criminal intent, see. You've got to introduce doubt in order to take away the possibility of prosecution.

Mrs. Boren: Mr. Ford said you have several cases now in San Diego. Now, are you doing work, I guess they did say you were doing work quite—Washington—

Mr. Brandow: Oh, all over.

Mr. Rau: Well, the only thing that sometimes is involved, but in all of these cases you understand, like yours, if you have any contingent fee arrangement, you have to get the consent of the Treasury Department to the fee arrangement, see. The Treasury Department in Washington always, I mean, they have that much control over it even they have no direct knowledge of what's going on. On the basis of procedure you always have to do that. That makes necessary that contact, always. If you don't have a contingent fee arrangement, you don't have to deal directly with Washington in the inception.

Mr. Brandow: Mrs. Boren, we are something like a specialist in the medical field, we specialize in just fraud cases, taxes. Does that give you the picture? The answer you were looking for? We are not working for the government.

Mr. Ford: You mean a doctor—

Mr. Brandow: We go in and we fight for the taxpayer.

Mr. Ford: A doctor here in San Diego who is a specialist in a certain field may have to go to Albuquerque or someplace to perform an operation. Well, we'll do the same thing.

Mrs. Boren: Well, I imagine someone who is in that field either they have a pretty good close connection with the Bureau or else they are not going to stay in that field very long.

Mr. Brandow: Well, Mrs. Boren, here's the thing. To a certain extent you have a break due to the fact that Charlie just quit and associated with our company. Normally the government doesn't come and tip you off what their hand is and Charlie isn't as the government tipping you off, but he's trying to give you a chance.

Mr. Ford: I'll tell you what my thoughts were and I know about as much about your background as you do. (Airplane) and this is no slur against you or your husband, either one. Here's a man who was a carpenter, all of the sudden he blossoms out into a prosperous contractor. Here's a woman whose a registered nurse and she suddenly has thrust upon her the job of trying to keep a business office together in one of the most complicated accounting fields there is. That's contracting, and, uh, here's one hell of a mess that they, that they're in and here during my investigation where I am accustomed to having people just harass the daylights out of me during an investigation, I've got a wide open field. I tell the guys, well, I'm going to be busy on something else, I'll come back and see you when I'm ready and they believe me, let me go ahead, make my examination, no resistance whatsoever or anything. I felt sorry for you.

Mr. Brandow: You see, we are not in the habit of coming around and seeing prospects, they normally come and see us. The only difference is to a certain extent you've got a chance, maybe, of doing something.

Mr. Rau: Well, of course, there's no objection while we are down here anyway.

Mr. Brandow: No, but—

Mrs. Boren: Well, I've certainly appreciated your coming here because of—

Mr. Rau: It doesn't make any difference about that, we have to be here anyway.

Mrs. Boren: When you have such big, as you say, the magnitude of such problems, well, you kinda like to know who the doctor is.

Mr. Rau: Yes, that's true.

Mr. Ford: And don't forget—

Mr. Brandow: Well, I was just trying to tell Mrs. Boren that Charlie here is doing something for her that I don't think she appreciates.

Mr. Rau: Well, if she, if you know that, I mean, you must know that.

Mr. Brandow: Charlie feels sorry for you.

Mr. Rau: It isn't very often that you get a sort of a preview of things like this. (Hearty laugh.)

Mr. Ford: I know a couple of other contractors here in town who would just love to have the same deal but unfortunately I don't feel sorry for them.

Mr. Brandow: Do you understand that? He's argued with us to come over here. Normally, you know, we don't have to do that and he's even willing to tip the hand. In other words we got something this time that normally we have to feel around and get. We know what the case is all interested in.

Mr. Brandow: Well, Charlies leaves his official records with the government when he goes, he can't take his records with him.

Mr. Rau: Well, I'll tell you if you have any lingering doubts about the position you're in. It seems to me, Mrs. Boren, it would be very easy for you to find out from whoever is going to fight it. I mean they'll want to know whether you have income that hasn't been reported or not and whether you've willfully concealed or not. If you search your mind a little bit you can probably recall a number of instances. So, if you have a feeling that somebody is going to advise you, they should be able to tell you whether you are in any sort of trouble or not if you will give them the facts about it, and not suppress them from them, I think they will tell you in about two seconds what the situation is because there isn't any question about it at all. If they haven't done so, the chances are it's because it hasn't been discussed or because they haven't been in possession of the facts because the analysis of the situation you're in is a very simple matter. There isn't anything to it. I mean, anybody can tell you that. Getting out of it is a horse of another color. But appraising it as far as whether it's serious or not and whether a conviction will result if the case is prosecuted, anybody can tell you that with very little experience. If you don't already know that, why it would be very easy to have it corroborated. Assuming, as I say, that you give them the facts, the same facts that have been ascertained by the government's investigation.

Mrs. Boren: Well, we'll go into it further and—

Mr. Ford: How does Mr. Boren feel?

Mrs. Boren: Oh, he's just kinda buying time. He doesn't know just, of course, know what, you never know

where to turn or what to do and having it come at us all of the sudden and it's just hard to decide. You know there is going to be a lot of expense one way or another and just how much that's going to be or where to go to minimize it and what to do is, how to handle, face our problems is a big decision.

Mr. Brandow: Is Mr. Boren still operating under a contractor's license?

Mrs. Boren: Yes.

Mr. Ford: They've got a nice tract going out here in, uh—

Mrs. Boren: Delta Heights.

Mr. Brandow: It's not going now though?

Mrs. Boren: Pardon me?

Mr. Brandow: Going now?

Mrs. Boren: Oh, yes.

Mr. Brandow: And you're not worried about this?

Mrs. Boren: Well, you are worried—

Mr. Brandow: Well, I wouldn't wanta have a tract going when my license is at stake.

Mrs. Boren: —whenever you hear, you are always worried whenever you hear of a Bureau coming in. I don't care if haven't, if you've never done a thing wrong, nevertheless it's just that's one of those things that always—

Mr. Ford: Yes.

Mr. Brandow: Well, uh, I won't say you've done anything wrong with it, but at this stage in the game it appears it's wrong and uh, you folks evidently don't have the answer to counteract it. In fact in your minds you most likely think it's wrong to, you most likely think the government's right. Lots of times the government's not

right in their contentions, in their, in their views, or we wouldn't have the name that we do.

Mrs. Boren: You ought to be very proud of your firm, really.

Mr. Brandow: We are, we work hard, do good work.

Mr. Ford: I had them knock a couple out from under me. That's why I joined them. You heard them say, if you can't beat 'em, join 'em?

Mr. Brandow: Because I'll tell you what, we start at the premises that the taxpayer isn't isn't guilty and is only wrong because they misunderstood. They misunderstood the facts and the situation. We go on that premise. (4:00 P. M.) And we don't work for anybody that's actually out and trying to beat the government. We are not interested. We are interested in the ones that did, appear to be, which I honestly think you feel in your mind right now that uh, the government's right because you, you're looking at cash, you're going to, you've got cash that hasn't been reported. Sometimes that's immaterial. But sitting around ain't gonna get you anywhere. Not in the right direction.

Mrs. Boren: Are you pulling—

Mr. Rau: No, no, it's true alright. Just like with any medicine or anything else. Here's a case where you've got a little lull, as I say, and you've got a change to prepare to do something to meet something that will come later or maybe avert it. You should take advantage of it. In fact that advise is good no matter who does it for you, whether you want us to do it or somebody else. That's just common sense to do something and meet your adversary before he's hitting you over the ears or over the head with a club and then try and defend yourself. It's just common sense. That's the position where you, you have to take some action. You should no matter who does it.

Mr. Brandow: When you're in court you're—

Mr. Rau: In fact uh—

Mr. Brandow: I mean, you're not just on the surface, you're, you're well, we'll say about three-quarters into the mess. The further in you go the harder it is to get out. It's just like when—

Mr. Rau: Well, take that advice regardless of whether we do anything to help you out or not. At least get somebody whose competent, proficient and has a sufficient ability to deal with a situation as quick as you can.

Mrs. Boren: How long have you been doing tax—

Mr. Rau: A little general advice you—

Mrs. Boren: How long have you been doing tax work?

Mr. Brandow: Since thirty-two.

Mrs. Boren: Well, you weren't together then?

Mr. Rau: No, we haven't been working together that long, only for about the last five years actually, six years, maybe seven—six or seven years.

Mrs. Boren: Were you specializing in tax work before then?

Mr. Rau: No, just handling it more or less off and on, just now and then. No, not specializing in it, I wouldn't say.

Mrs. Boren: The last five years.

Mr. Rau: I would say the last six, six years.

Mrs. Boren: When did you get out of the F.B.I.?

Mr. Brandow: In thirty-two.

Mrs. Boren: Thirty-two. Oh, I see. You've been working in tax and accounting field. Were you affiliated with another attorney before that or—

Mr. Brandow: Well, a kid I went to school with, he died. He got me into it and then he died.

Mrs. Boren: He got you into it and then he died.

Mr. Brandow: Well, we know taxes, don't worry about what we know. What you had better worry about is your problem and getting somebody to solve it, whether you have us or somebody else, you'd better get busy.

Mr. Rau: That's right.

Mr. Brandow: As attorneys and accountants aren't necessarily tax specialist you'd better get somebody who knows taxes.

Mr. Rau: And you'd better get somebody who knows people too, as well as taxes. That's also important.

Mrs. Boren: I think that's true too.

Mr. Brandow: I reviewed your case, I can see it, and it looks very bad at this stage.

Mr. Rau: Well, I don't think we need to belabor that point. I mean that's, I didn't come over with—

Mrs. Boren: Now, you go home now, they're not here.

Mr. Brandow: Well, maybe we shouldn't. I just feel that I—I never seen anybody in my life of all the people that I handled work for I've never seen anybody that confident.

Mr. Rau: Well, maybe she isn't worried, maybe, we'll have to let things go a little bit further.

Mr. Brandow: Are you worried at all?

Mrs. Boren: I'm worried, damn worried. I think it's just like a child when he goes to the doctor, he's scared to death. He doesn't know whether he's going to get a shot or not. Well, I'm just like that, I don't know whether I'm going to get treated or what the hell's uh cooking and I'm—

Mr. Ford: Well, you'd better get the doctor.

Mr. Rau: Well, now, if you had some, if you had an attorney or an accountant or somebody you say that has been handling the stuff?

Mrs. Boren: Our accountant.

Mr. Rau: Well, haven't you talked it over with him at all? Haven't you gotten any suggestions from him? Haven't they told you what should be done?

Mrs. Boren: Well—

Mr. Rau: What are the costs or what might happen, or anything?

Mrs. Boren: Well, the only thing we could do, well, we were just waiting until Mr. Ford came back because they were given no information at the time and—

Mr. Brandow: Did you tell them you were coming back?

Mr. Ford: Hunh?

Mr. Rau: Well, it doesn't sound to me—

Mr. Brandow: Did you tell them that you were coming back?

Mr. Ford: Probably did, yah. I told them I would be back in a month or six weeks.

Mr. Brandow: Did you really think that Charlie was coming back?

Mrs. Boren: Well—

Mr. Rau: Well, it doesn't make any difference.

Mrs. Boren: —not very acquainted with the type, the way the Bureau acts—

Mr. Brandow: His job was to get a prosecution. The other end was to get some taxes.

Mrs. Boren: He even told them, he even told them he wasn't working in a fraud department there, he was

associating 'cause they were too busy on the other side. So, so what do you think they, what were they to—

Mr. Brandow: Well, of course, the government, uh, here's the thing, Mr. Boren, you're gonna build some houses, you want to get the houses built. You follow Me? You've got you way of building them, but the government they want to get taxes and on prosecutions they're not so interested in feeding you as they're interested in getting the fine to go with it.

Mrs. Boren: Umhum.

Mr. Brandow: Are you familiar with that?

Mr. Ford: And the publicity to—

Mr. Brandow: The more they can build a case the less you can fight the case, the better the case is.

Mr. Rau: That's right, yah, publicity. Publicity is very important.

Mr. Brandow: Well, it's the same damn thing. You get arrested out here, well, if the cop can get the District Attorney to make the case stick it's a lot better than if he loses it.

Mrs. Boren: That is the thing that also was worrying me as Mr. Ford said we were to be an exemplary case and that's why they were working so hard on it and then if you're to be the example my God I hope they've got somebody else they like better for an example.

Mr. Ford: Well, the point there is that I had a certain number of contractors that I had to work in my particular field and uh yours was the easiest one. It was, that is, a pushover so, fine, we'll go on this one uh and I'm only one man working down here un with the aid of a couple of others uh, this is going to be a quickie, let's knock it over, the publicity will automatically make all of

the rest of the contractors file amended returns and we will get our money and only have to work one case.

Mrs. Boren: Umhum.

Mr. Ford: So uh, there was yours and about oh, three or four others down here. I was to stick my feet in and pick the easiest one and knock it over.

Mr. Rau: Well, that makes sense. You don't have to know anything about law or taxes to know that. That's just good judgment.

Mrs. Boren: Do you know the fellow whose taking over where you left off.

Mr. Ford: Yah, I know him very well. I've worked with him since I started in nineteen forty-five.

Mr. Brandow: You got our services, drop by and see us.

Mrs. Boren: Pardon me.

Mr. Brandow: I say in the event you retain us, you're not getting no connections. You understand that, I mean, we'd fight, we don't take your case 'cause we think we can get somebody to squash it. If that's what you're thinking.

Mrs. Boren: No, I just was curious uh, we're probably going to have to meet him and I was just curious.

Mr. Rau: Well, your best, your best bet is to get the doctor in and not meet anybody no more. Let the doctor do the talking.

Mrs. Boren: Yah, that's—

Mr. Brandow: That's what's the trouble already, you folks, the, have, what little you said or shown them, you show them the wrong thing and represent it to their favor. Don't you get that picture? For instance, you can look at uh, well, some income we'll say, and to you

it's income. The government says its income yet it's income when it may not be income at all as far as taxes are concerned. In other words, I'm sort of intrigued with your thing for I think maybe something can be done.

Mr. Ford: —feels sometimes what appears to be income isn't income because of the fact that you're working on a uh, an accrual of money that you don't see for a long time in some instances and what might appear on the fact of it in several isolated instances to be income could be, in some instances, it could be shown, well, that's not income, not until next year.

Mrs. Boren: Well, you say, well, I'll go over it again with Cliff and I'm glad I met you and—

Mr. Rau: And, let me suggest this, Mrs. Boren, if you have confidence in the attorney or accountant, whoever has been representing you, I think you ought to confide a little bit in them and get at least their opinion of, of the situation that you're in because to me it seems elementary. I'm surprised that you haven't gotten that advice, if you have confidence in them already. I mean, all it will do is corroborate what we have been telling you, I think, if you've known the people longer and trust them, that you are entitled at least to get that much.

Mrs. Boren: Umhum.

Mr. Rau: —support for our position, see, before you decided to do something you want to feel that you have the need of it, which I'm convinced of, we are all convinced, but you may not be, but if you've known somebody, and dealt with them for a number of years, whose familiar with your affairs then you ought to talk to them. Frankly about it, I mean. Not keep things from them but just talk to them frankly. There's only one answer to it actually.

Mr. Brandow: And I wouldn't put it off. The quicker you stop this thing, the better off you are.

Mr. Rau: Oh, that's true. Yah, regardless of who does it, that's true. The quicker you get into anything the better off it is, anything. In fact, uh, one of two things is true, either your accountant or your tax attorney, or whoever has been advising you when this thing came up, this investigation that Mr. Ford conducted, they either didn't know the facts about the evasive practices that had gone on or if they did they are rather incompetent in taking no steps in trying and do something about the situation, one of those two things is true.

Mr. Brandow: My God, they haven't taken any steps that would—

Mr. Rau: They either didn't know, or else they don't know how to do anything about it.

Mr. Brandow: Didn't they try to cover up or anything like that?

Mrs. Boren: No, there's been nothing.

Mr. Brandow: Nothing done at all?

Mrs. Boren: No work done out of there.

Mr. Rau: It's attributable to one of two reasons, they either didn't know anything about it, I mean by that, after all they don't know everything you do, so they may not have known about it, or had they known, they may not have been capable of doing anything about it.

Mrs. Boren: Umhum.

Mr. Rau: You know the old saying, no news is good news. But sometimes that doesn't apply. In these tax cases sometimes—

Mr. Ford: If anybody ever tells you again that fraud agent is helping out somebody else on a non-fraud case,

don't you believe it because they just don't do that. It's the other way around.

Mrs. Boren: You are a rascal.

Mr. Ford: Well, I had my job, I was being paid a tremendously large salary and I—

Mr. Brandow: You have to have some way to make a living if you're not working. Well, I'll tell you, you know, it's just a lot of, the government tells taxpayers a lot of things and the taxpayer can always say it isn't so, but if the taxpayer doesn't then it becomes so. And that's all we do all the time—

Mr. Rau: Well, that's true. He's talking about the technical effect of admissions, which is, of course, apply in tax cases like any legal matter. If you get a defendant to admit something or a defendant leaving a representative to admit something, or a defendant leaving a representative to admit something, of course, it can be used against him. And the government quite naturally, since it's trying to build up a case, will take the admissions that are helpful to their case and maybe forget about some of the others facts that aren't so helpful.

Mr. Brandow: That's only from an agents standpoint.

Mr. Rau: You've got an adversary. It's just like fighting anybody, you take whatever steps are necessary to take, to make use of, to beat you at something or other. It's an opponent proposition. It's true of all criminal matters and you've got to figure that you have an opponent, you have an adversary. You don't get favors from him. If they can sell you on the idea by being nice to you or coddling you along that you're going to get some benefit out of it, that's fine, that does half of their work for them. But it isn't true. You are going to end up on the other side of the ring ultimately.

Mr. Brandow: Well, I'll tell you, we're going out to dinner at the Bahia. We'll be, we'll be in town about six or something like that—

Mr. Rau: Well, I don't think from talking with Mrs. Boren, she's in any position now to make up her mind.

Mr. Brandow: No, what I was going to say, if she's interested and she wants to find out, make up her mind, we will be here 'til six.

Mr. Rau: Well, that's alright—

Mrs. Boren: Well, I know where go get ahold of Mr. Ford and I—

Mr. Brandow: Well, we don't want to—

Mr. Rau: She doesn't have to, she doesn't have to act that quickly. I mean, the thing is you ought to do something in the near future—

Mr. Brandow: Well, within another week at least, after that I'm not interested, are you?

Mr. Rau: Oh, I wouldn't say that now.

Mr. Brandow: No use taking it after it's gone.

Mr. Rau: Well, I wouldn't say that.

Mr. Brandow: I haven't lost a case yet, and I wouldn't want to start now.

Mrs. Boren: No, what—

Mr. Rau: No, I'm serious.

Mrs. Boren: The way I feel I wouldn't want you to start now either.

Mr. Rau: Why, we're got a look at the situation, we know the facts, as well as anyone, and nobody is kidding you or trying to bluff you.

Mr. Brandow: You may know more of the facts than we know, all we know is what the government knows.

Mr. Rau: That's right, there are probably others that aren't, that haven't been ascertained yet. Alright, Mrs. Boren, I hope you are feeling better before long.

Mrs. Boren: Thanks a lot for coming by Mr. Rau. I know you must be mad.

Mr. Rau: I hope you settle your difficulties in one way or another, regardless of who accomplishes it. You got all the good fight—

Mr. Brandow: I do too.

Mrs. Boren: Thanks a lot. Thanks Mr. Ford.

Mr. Ford: Bye, bye.

Mrs. Boren: We'll see you.

Mrs. Boren: This is a recording made of a conversation on Tuesday, September 28, 1954, between the following persons: Mr. Ford, Mr. Brandow, Mr. Rau and Mrs. Boren. It started at 3:40 and ended at 4:10.

Machine Clock: Thirty five minutes, twenty seconds.

Government's Exhibit No. 75.

Mr. Vincent B. Murphy
Supervisor, Fraud Group
Los Angeles, Calif.

April 28, 1954

Charles D. Ford
Int. Rev. Agt., San Diego, Calif.

BOREN, Clifford O & Delta M
San Diego, Calif.

Years: 1950 and 1951

Preliminary examination of the records of Clifford O, & Delta M. Boren for the years 1950 and 1951 discloses that checks received by the taxpayers for sub-contract work on tract houses was not picked up in income, as follows:

1950

From the San Diego Federal Savings & Loan Assn. for the account of San Diego Builders Control—	29,617.68
From the Hubner Building Co.	9,250.83

1951

From San Diego Federal for the account of Builders Control	7,770.62
From the Hubner Building Co.	2,300.28

The records of the above organizations indicate that the payments covered billings by Boren for extra work performed by Boren which was over and above the requirements of the prime contract, and to cover increases in labor costs occurring after execution of contracts.

On January 25, 1952, the taxpayers entered into an agreement with Margolis, Levikow and McKillop, Realtors, to purchase 74 lots in San Diego for 1,750.00 each.

The records of the Realtors showed payments on this purchase as follows:

- (1)* 1-25-52 \$50,000.00 in Currency
- (2)** 4-24-52 \$50,000.00 by Cashiere's Chech
- (3)*** 12-10-52 \$29,025.00 by check on B of A #3 (S.D.)

*Mr. Wilson, manager of the Realty firm, stated that he had objected to handling so much currency but that Mr. Boren had insisted on making payment in currency.

**Cashier's Check purchased with eight separate checks on the B of A totaling 29,000.00 and currency in the amount of 21,000.00.

***Check on Borens account.

As the checks referred to in paragraph one were endorsed and cashed by Mr. and Mrs. Boron it is believed that an attempt has been made by them to evade their just taxes and it is therefore recommended that a joint investigation with the Intelligence Division be requested.

Comments and Rulings of United States District Judge William M. Byrne of November 19, 1956, in Denial of Motions for Judgments of Acquittal Contained in "Reporter's Transcript of Proceedings of Further Hearing on Motions for Judgment of Acquittal" Pages 23-26.

The Court: (Judge Byrne) I read that one, too.

I am satisfied that the law as enunciated by the cases is that it is not necessary to allege the materiality; but it is necessary, of course, to be material. On the other hand, as several of the cases point out, if it is within the jurisdiction, in other words, if it satisfied the first requirement, that it is within the jurisdiction of the agency, then ordinarily it is material. And, as a matter of fact, it would be difficult to conceive how anything within the jurisdiction of the agency would not be material.

So if it satisfies that first requirement, it satisfies the second requirement.

As an illustration, of course a grand jury might investigate a matter and after an investigation just feel that there was absolutely nothing to it and not return an indictment; in other words, they return a no bill. But, of course, they had jurisdiction to make the investigation, and any statements that were made before them were made while they had jurisdiction. So under this section, which refers to agencies of the government, the same would be true: If the agency was making an investigation, it would be exercising its jurisdiction, making an investigation of a proper matter for the agency, and it would be exercising its jurisdiction. So in this case the Internal Revenue Department, through Schlick and Sullivan, were certainly making an investigation of a matter that came within the purview of that agency, therefore they had jurisdiction of the matter. Now, any statement that is

made to them in connection with the matter they are investigating is material, and it is material even though they, themselves, when they finish the investigation, may conclude that the matter would not even be submitted to the grand jury. They may even conclude that there is nothing to the case, still it is material. So, of course, when it gets to the point where there is an indictment and a trial, the fact that the jury finds that they are not guilty of the conspiracy count, that in itself, of course, does not necessarily mean that they wouldn't be guilty of this count.

Mr. Ferrara's contention that they are inconsistent, of course, is not accurate, that they necessarily would be inconsistent. It could be, as far as count 1 is concerned, that the jury thought that there was a representation by Ford and by the others to Mrs. Boren that Ford would disclose the government's case, but under my instruction as to the time element, the fact that Ford no longer was with the government after September 10th, I believe it was—

Mr. Neukom: That is right.

The Court (continuing—that, therefore, technically, under my instruction, they couldn't find them guilty of count 1, but of course could insofar as count 2. Or it might well be that the jury thought, with respect to both of those counts, count 1 and count 5, that there was a conspiracy to defraud Mrs. Boren and Kirsch, and that the conspiracy, for instance, to defraud Mrs. Boren was that they represented to Mrs. Boren that Ford would divulge the government's case in order to save her some taxes, but it was all done in an attempt to defraud Mrs. Boren, and under my instructions they would have to find them not guilty as to count 1 and find them guilty as to count 2.

As a matter of fact, while I never comment to a jury as to whether their verdicts are good or bad, strangely enough in this case had I been sitting in place of the jury I would have found not guilty on the same counts as they found them not guilty. But, as I stated before, that doesn't necessarily mean that under count 2 or count 3 there is any inconsistency.

The only thing, as far as count 2 and count 3 are concerned, they are charged with fraudulent statements and representations made, in that the defendant stated at no time during the discussion at Mrs. Boren's house did anyone state directly or imply that Mr. Ford was willing to disclose the government's case, when they knew that they did state and imply during the conversations at Mrs. Boren's house that Ford had disclosed the government's case and was willing to disclose it to her.

It was just a question of, was there any evidence upon which the jury could conclude the accuracy of that.

Of course, insofar as the portion of it with respect to whether the statements were made, they are in an affidavit that was presented to the jury, and all that was necessary, then, was for the jury to determine whether there were such statements made at her house.

Both motions are denied. The matters will be continued for probation report and sentence to December 10th.